Case No.: 17-55435

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE, I, individually and on behalf of proposed class members; et al.,

Plaintiffs-Appellants,

vs.

NESTLE, S.A., et al.,

Defendants-Appellees.

Appeal from the District Court for the Central District of California,
Case No. 05-05133 SVW-MRW
Honorable Steven V. Wilson, United States District Judge

APPELLANTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The Supreme Court's recent decision in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), holds that foreign corporations are not subject to suit under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, because of foreign policy considerations inherent in subjecting foreign corporations to liability for international law violations. *Id*. at 1406, 1408. As a result of *Jesner*, Plaintiffs' claims against Nestlé, S.A., Nestle Ivory Coast and Cargill West Africa cannot proceed and these parties should be dismissed from this appeal. This leaves the three key Defendants, Nestlé, U.S.A.; Cargill, Incorporated; and Cargill Cocoa all incorporated and with headquarters in the United States. All three of these Defendants aided and abetted child slavery in the United States and thus and otherwise satisfy *Kiobel*'s "touch and concern" test. *See* Appellants' Opening Brief ("AOB") at 18–33; Appellants' Reply Brief ("ARB") at 5–7, 9–18. The concerns raised in *Jesner* do not apply here, and *Jesner* also further supports that the operative extraterritoriality test for ATS claims is whether they "touch and concern" the United States.

II. THE CONCERNS RAISED IN *JESNER* DO NOT APPLY HERE

The *Jesner* Court explicitly declined to rule on the issue of whether ATS claims could be brought against U.S. corporations. 138 S. Ct. at 1403. Moreover, nothing in the *Jesner* holding or reasoning undermines this Court's controlling decision in *Doe v Nestle*, 766 F. 3d 1013, 1022 (9th Cir 2014), holding that there was corporate liability under the ATS. The *Jesner* Court declined to resolve the Circuit split in which the Second Circuit has found no corporate liability under the ATS and all other Circuits that have addressed the issue have found corporate liability.[1] Moreover, the *Jesner* Court left its holding and analysis in the *Sosa* case in effect affirming the use of the ATS to hold international law violators accountable for egregious human rights violations. Thus, this Court's prior holding in this case is controlling on this issue and can only be modified by an *en banc* panel or the Supreme Court. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875–76 (9th Cir. 2014).[2]

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[1] *Compare Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1017–21 (7th Cir. 2011) (finding corporate liability under the ATS); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1020–22 (9th Cir. 2014) (same)*; Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 40–55 (D.C. Cir. 2011) (same), *vacated on other grounds*, 527 Fed.Appx. 7 (D.C. Cir. 2013), *with Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) (finding no corporate liability under the ATS).

[2] There is a wealth of briefing on the underlying issue of corporate liability in both the *Kiobel* and *Jesner* cases. Of particular note are the amicus curiae briefs filed by the United States in both cases urging the Court to find that corporate liability be permitted under the ATS. Brief for the United States as Amicus Curiae Supporting

The *Jesner* Court expressed concern about the protests of foreign governments about the application of the ATS to their corporations, not to U.S. corporations. 138 S. Ct. at 1406–07. For example, as the Court noted in footnote 21 of its decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), the government of South Africa issued such a protest in the context of several class actions targeting corporations that allegedly profited from apartheid. Once South African corporations were dismissed as defendants, the South African government dropped its objection to continuing litigation against U.S. corporations for Apartheid-era crimes.[1] In *Kiobel v. Royal Dutch Petroleum, Inc*., 569 U.S. 108 (2013), the governments of the United Kingdom and the Netherlands protested the application of the ATS to their corporations, asserting that the exercise of such jurisdiction over their corporations itself violated international law. Brief of Governments of the United Kingdom et al. as Amicus Curiae in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491). However, no government has questioned the legitimacy of U.S. courts holding U.S. defendants accountable for egregious human rights violations abroad.

Petitioners at 12–31, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491); Brief for the United States as Amicus Curiae Supporting Neither Party at 8–17, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499).

[1] *See In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009); Letter from Jeffrey Radebe, Minister of Justice and Constitutional Dev. of S. Afr., to Judge Scheindlin (undated), *available at* https://tinyurl.com/ydayfdye.

The assertion of such jurisdiction is well established. *See, e.g.*, *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285–86 (1952); *Blackmer v. United States*, 284 U.S. 421 (1932). Indeed, the *Kiobel* analysis itself was designed to ensure that there was a strong U.S. connection to any ATS claims made and courts, including this one, have included whether the defendants are U.S. corporations in determining whether a case touches and concerns the U.S. *See, e.g.*, *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 & n.9 (9th Cir. 2014); *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 530 (4th Cir. 2014); *Krishanti v. Rajaratnam*, No. 2:09-CV-05395 JLL, 2014 WL 1669873, at *10 (D.N.J. Apr. 28, 2014); AOB at 33–34. No additional barriers are needed to protect U.S. defendants from liability under U.S. law.

This case presents none of the foreign policy considerations present in *Jesner* or the other cases involving foreign corporations of concern to the Court. There has been no Statement of Interest submitted by the U.S. government. *See* ER 180–203 (civil docket sheet showing no such document submitted). The Ivory Coast has not issued any protest; nor is the Ivorian government involved in the claims at issue in this case. *Id.* The United States has a strong interest in ensuring that its corporations are not contributing to the scourge of child slave labor, a practice that has plagued the children of West Africa for decades without effective redress. *See* AOB at 30–31; ARB at 5–7. There is nothing in the *Jesner* decision

that prevents this Court from allowing these plaintiffs to prosecute this case under the ATS.

III. *JESNER* REPEATEDLY REFERS TO THE TOUCH AND CONCERN TEST.

In addition, *Jesner* confirms that extraterritorial application for an ATS claim is determined by whether it 'touches and concerns' the United States, as held in *Kiobel* and *Nestlé I. Nestlé I's* holding to that effect is binding on the panel unless Supreme Court law is "clearly irreconcilable". *Gomez*, 768 F.3d at 875–76. Supreme Court case law is not clearly irreconcilable with the touch and concern test for ATS claims, including after *RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016)*. *See* ARB at 3–4, 7–9. *Jesner*, the only Supreme Court case to address an ATS claim since *Kiobel*, confirmed this. *Jesner* discussed the proper inquiry for ATS claims' extraterritorial application and unqualifiedly emphasized that it is whether allegations "touch and concern" the United States. 138 S. Ct. at 1398, 1406*; id.* at 1429, 1431 n. 8, 1436 (Sotomayor, J., dissenting).[4]

[4] Notably absent is any reference whatsoever to a "focus" or *Morrison* based test that Appellees suggest has replaced the "touch and concern" test as the Court's focal point for the extraterritoriality of ATS claims.

IV. CONCLUSION

This Court must dismiss Plaintiffs' claims against Nestlé, S.A., Nestle Ivory Coast and Cargill West Africa, but should retain the claims against Nestlé, U.S.A., Cargill, Incorporated, and Cargill Cocoa. These claims should be evaluated under a "touch and concern" standard and, for the reasons stated in Appellants' briefing, Appellants' Complaint sufficiently supports a claim under the ATS.

Dated: May 18, 2018.

By: s/ Paul Hoffman
Paul Hoffman
Attorney for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

The attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(A) or Circuit Rule 32-1 but complies with the 15 page limitation established by separate court order on April 25, 2018 as Docket No. 45. This brief is 6 pages in length.

Dated: May 18, 2018.

By: s/ Paul Hoffman
Paul Hoffman
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2018, I electronically filed the foregoing document APPELLANTS' SUPPLEMENTAL BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 18, 2018.

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